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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 113

UNITED STATES OF AMERICA, PETITIONER

v.

HOMER O. CORRELL AND DOROTHY CORRELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court did not render any opinion. The opinion of the court of appeals (R. fol. 70) is reported at 369 F. 2d 87.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1966 (R. fol. 74). By order of Mr. Justice Stewart, dated February 24, 1967, the time for filing a petition for a writ of certiorari was extended to and including April 28, 1967. The petition was filed on that date, and was granted on June 12, 1967 (R. fol. 76). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

A salesman daily traveled by automobile on behalf of his employer to various towns and cities around his residence, usually covering 150 to 175 miles per day. He generally left his residence at 5:00 a.m. and returned at 5:30 p.m. The question presented is whether the amounts he expended for breakfast and lunch while on the road constitute deductible "traveling expenses * * * [incurred] while away from home in the pursuit of a trade or business" within the meaning of 1954 Code § 162(a)(2) or nondeductible "personal" or "living" expenses under Code § 262.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 162. TRADE OR BUSINESS EXPENSES.
>
> (a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
>
> * * * * *
>
> (2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *
>
> * * * * *
>
> (26 U.S.C., 1958 ed., 162.)
>
> SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.
>
> Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.
>
> (26 U.S.C. 262.)

STATEMENT

Respondent[1] in 1960 and 1961 was one of about 16 salesmen who worked for Hale Brothers, Inc., a wholesale grocery company with headquarters in Morristown, Tennessee. Each salesman covered part of a territory that ranged over the eastern third of Tennessee, southeastern Kentucky, and the southwestern corner of Virginia. One or two called only on accounts in their home towns. A few others—those covering the Kentucky territory—occasionally made an overnight sales trip. But most—including petitioner—would leave home each day early in the morning, make calls in several cities and towns, and return home before dinner. (R. 25a–32a, 37a–38a, 40a, 54a, 66a.)

Hale required each salesman to have breakfast and lunch at specified times and places on his route, so as to be available for telephone calls from Hale's office. Hale's policy was to reimburse every salesman, even if he never left his hometown, for his out-of-pocket expenses, including the cost of breakfast and lunch. (R. 27a–29a, 34a–39a, 41a–45a, 47a–48a.)[2]

Petitioner lived in Fountain City, Tennessee—about 50 miles from Morristown. He was assigned two areas,

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[1] Mrs. Correll is a party to this action only because joint returns were filed; Mr. Correll will be referred to as respondent.

[2] The salesmen were told when hired that the company would reimburse actual daily meal expenses (R. 40a). Hale also provided each with, and paid the operating expenses of, an automobile (R. 27a–28a, 43a, 57a–58a). Respondent excluded the reimbursement of the latter expenses from his taxable income, treatment the Commissioner agrees was proper under Sections 62(2)(C) and 162(a) of the 1954 Code.

one southwest and the other east of Fountain City. His routes required him to call on each customer in his area once or twice a week. He left Fountain City at about 5 a.m., drove an hour or more, and ate breakfast at the first stop on his route for that day. He then pursued his sales route until about 2 p.m., when he ate lunch, again at a customer's restaurant. Although he seldom was more than 55 miles from his home, he generally drove a total of 150 to 175 miles daily. He typically finished his daily schedule by 4 p.m., transmitted his orders to Morristown, and returned to his home in Fountain City by 5:30 p.m. (R. 43a–55a.)

The Commissioner of Internal Revenue required respondent to include in his gross income the amount he received from Hale as reimbursement of the cost of meals he ate while traveling his routes, and denied a compensating deduction (R. 5a, 10a, 13a, 57a, 58a). Respondent paid the resulting deficiency and sued for a refund (R. 3a). The jury found for him (R. 65a). In a motion for a directed verdict and a motion for judgment notwithstanding the verdict, the Government asserted that the meal expenses as a matter of law were not deductible as expenses incurred "while away from home" because not incurred on trips requiring a stop "overnight" (R. 19a–20a).[3] The district court

[3] Respondent contended in the trial court that his meal reimbursements were excludable from gross income pursuant to Section 119 of the Code, which applies to meals "furnished * * * for the convenience of the employer * * * on the business premises of the employer * * *." The trial judge ruled against respondent (R. 58a). Respondent did not raise this contention in the court of appeals.

denied both motions (R. 21a, 56a–57a). The Court of Appeals for the Sixth Circuit affirmed (R. fol. 70).

INTRODUCTION AND SUMMARY OF ARGUMENT

Every Internal Revenue Act since the adoption of the Sixteenth Amendment has expressed the general policy now embodied in Section 262 of the Internal Revenue Code of 1954, that "personal, living, or family expenses" are not deductible. Of equal importance and longevity has been another policy, now found in Section 162(a) of the Code, that "all the ordinary and necessary expenses" of carrying on a trade or business are deductible.

The interaction of Sections 162 and 262 is highlighted in a case such as this, where a taxpayer buys a meal—plainly a "personal, living" expense—in the course of travel that is part of his income-producing work. Is a deduction allowable because the money was spent in the course of the taxpayer's business activities? Or is it not because the cost of food is an ordinary expense of everyday life?

Until 1920 it was unclear whether any deductions were allowed for meals or lodging, even if incurred during a business trip. Then the Treasury, recognizing that a portion of such expenses might be attributable to the exigencies of business travel, sought to give simultaneous recognition to both congressional policies by allowing a deduction, but only to the extent that business demands increased the cost of a given expense. The Treasury decided the resulting need to divide every businessman's meal and lodging expenses into "business" and "personal" portions was a "cumbersome" procedure. Therefore, Congress, at the sugges-

tion of the Treasury, in 1921 added to the revenue laws a deduction for "the entire amount expended for meals and lodging * * * *while away from home* in the pursuit of a trade or business" (emphasis supplied)—the language that with no presently material change now appears in Section 162(a)(2) of the Code. Thus, the administrative problem was solved—there was no further need to apportion the expense of one meal into deductible and personal parts.

The new statutory requirement clearly allowed the man who lives and normally works in one city the deduction when his business took him for several days to a distant location. On the other hand, that requirement did not permit the commuter to deduct the cost of a lunch eaten a block from his office, or the intra-city business traveler the cost of a lunch eaten on his route.

But between these extremes are taxpayers for whose circumstances there was no dispositive statutory rule and in whose cases the Commissioner had to rule in a way that accommodated the contrasting policies of Sections 162 and 262. What of the taxpayer who lives and works in Manhattan and buys lunch while on a three-hour trip to Newark? Or the salesman or doctor who spends part of his working day driving from one town to another in Westchester County? Or the New York businessman who takes a one-day trip by train to Philadelphia or by jet to Chicago?

All of these taxpayers are in essentially the same economic position as the commuter or intra-city traveler. Like them, each buys his lunch and perhaps other

food away from his abode during the course of his workday. For each, the needs of his business on a particular day determine where he eats. But none has an expense discernibly different from the commuter and the intra-city traveler—or each other. All incur their daily living expenses for meals and lodging only once, without any significant increase or duplication as the result of travel. Their experiences are thus materially different from those of the traveler who must stop for sleep or rest, and thus duplicate the substantial cost of maintaining his residence.

The Commissioner published his position in 1940, and has since consistently maintained, that the Congressional objectives would best be satisfied if a taxpayer were considered "away from home" within the meaning of Section 162(a)(2) only when on a trip requiring sleep or rest. Under those circumstances, the prohibition of Section 262 against the deductibility of a personal expense gives way to Section 162(a)(2).

In at least a dozen cases, beginning in 1944, the Tax Court consistently upheld the Commissioner's disallowance of meal expenses incurred during what were essentially one-day trips. The only Court of Appeals to review the issue agreed with the Tax Court. Congress, in drafting the 1954 Code, evidenced its familiarity with the Commissioner's interpretation, and ignored a taxpayer plea for change.

In 1962, a court of appeals for the first time allowed the deduction of meal expenses incurred on one-day trips that had not required lodging expenses. The Eighth Circuit asserted that the Commissioner's "rule

is merely an arbitrary line-drawing having no basis in the statute," and that "these cases must be decided according to their own sets of facts." *Hanson* v. *Commissioner,* 298 F. 2d 391, 397; accord, *United States* v. *Morelan,* 356 F. 2d 199, 208–210 (C.A. 8). In the present case, the Sixth Circuit followed the Eighth.

On the other hand, the First Circuit, after the decision below, ruled against a taxpayer who claimed a deduction for three meals purchased each day while on business trips, which were in mileage shorter and in hours longer than respondent's. *Commissioner* v. *Bagley,* 374 F. 2d 204, petition for certiorari pending, No. 155 this Term. That circuit saw no justification for allowing the one-day traveler to deduct his meal expenses simply because "he is traveling more miles" than the commuter. It concluded that the language of Section 162(a)(2) "means travel in a substantial sense and not a diurnal round starting and ending at home. * * * We can think of no sharper place to draw the line, and since we also think of no better one, we accept what has long been the Commissioner's." 374 F. 2d at 207–209.

This disagreement among the court of appeals brings to this Court the question whether the Commissioner's long-standing interpretation of Section 162(a)(2) should be sustained as a proper exercise of his administrative authority to interpret the Tax Code.

The Commissioner's position clearly accords with the language and purpose of the statute. Section 162(a)(2), by its terms, does not apply to all business travel, but only to travel that is "away from home." The reason for this limitation is clear enough.

Many businessmen who travel outside their home cities and return to their residences in the evenings may not travel greater distances, or incur greater living expenses, than the typical commuter, the individual who travels on business within a given metropolitan area, or the itinerant business traveler who has no permanent residence, none of whom is entitled to the benefits of the statute. The Commissioner's interpretation implements the policy of Section 262 by not allowing the deduction to all such similarly situated travelers and, at the same time, carries out the purpose of Section 162(a)(2) by granting the deduction to those taxpayers whose travel is so extensive that they must ordinarily incur the substantially increased expense of providing a temporary abode in addition to a regular residence. Further, the Commissioner's interpretation is needed to translate the generalized statutory language into a rule that is sufficiently clear and objective to be applied to the great variety of factual patterns that arise.

The views of the Sixth and Eighth Circuits, on the other hand, appear to give no cognizance to the Commissioner's authority to adopt reasonable administrative interpretations of statutory concepts in order to effectuate the underlying Congressional objectives. Nor do those courts offer any guidance as to what factors shall determine when travel takes a man "away from" his home. Instead, they would have the case of every salesman—and there are more than a million—turn on an examination of the manifold circumstances of his every day's activities—an approach that defeats the need for a clear and workable rule.

This Court should approve the Commissioner's sleep-or-rest test.

ARGUMENT

I. THE STATUTORY SCHEME PERMITS A DEDUCTION WHEN BUSINESS TRAVEL RESULTS IN EXPENSES THAT SIGNIFICANTLY DUPLICATE OR INCREASE THOSE CUSTOMARILY INCURRED

Section II B of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 167, permitted deductions for those "necessary expenses actually paid in carrying on any business,[4] *not including personal, living, or family expenses.*"[5] (Emphasis supplied.) Substantially the same

[4] All subsequent Internal Revenue statutes have similarly allowed the deduction of all ordinary and necessary expenses incurred in carrying on a trade or business. Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 214(a); Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 214(a); Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 214(a); Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 23(a); Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 23(a); Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 23(a); Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 23(a); Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 23(a); Internal Revenue Code of 1939, Sec. 23(a) (26 U.S.C. 1952 ed., Sec. 23(a)); Internal Revenue Code of 1954, Sec. 162, *supra*, p. 2.

[5] The prohibition against the deduction of personal, living, or family expenses has been reiterated in every subsequent Internal Revenue Statute. See Revenue Act of 1916, c. 463, 39 Stat. 756, Sec. 5(a); Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 215(a); Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 215(a); Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 215(a)(1); Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 215(a)(1); Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 24(a)(1); Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 24(a)(1); Revenue Act of 1934, c. 277, 48 Stat. 680, Sec.

language appeared in the Revenue Act of 1916, c. 463, 39 Stat. 756, Section 5, and the Revenue Act of 1918, c. 18, 40 Stat. 1957, Sections 214 and 215. No section expressly dealt with travel expenses, or with any other business occasion that could result in a meal or lodging expenses.

In 1919, the Commissioner sought to define administratively those travel expenses that were deductible business expenses rather than nondeductible "personal" or "living" expenses. He first took the position that the only deductible expense was the cost of transportation, and that meal and lodging expenses were not deductible. Treasury Regulations 45 (1919 ed.), Article 292. A year later, the Commissioner permitted the deduction of expenses of meals and lodging, but only to the extent that they were incurred while "away from home" and were "in excess of any expenditures ordinarily required for such purposes when at home." Treasury Regulations 45 (1920 ed.), Article 292; Mim. 2688, 4 Cum. Bull. 209 (1921).

After one year, the Commissioner recognized that the new rule, while logically sound, provided "too cumbersome a procedure".[6] Accordingly, at the suggestion

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24(a)(1); Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 24(a)(1); Internal Revenue Code of 1939, Sec. 24(a)(1); Internal Revenue Code of 1954, Sec. 262.

[6] Statement of Dr. T. S. Adams, Tax Advisor, Treasury Department, Senate Hearings on Internal Revenue, September 1921, p. 50 (Confidential Committee Print, subsequently released for publication).

of the Treasury Department,[7] Congress enacted Section 214(a)(1) of the Revenue Act of 1921, c. 136, 42 Stat. 227, to provide for the deduction of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."[8] See H. Rep. No. 350, 67th Cong., 1st Sess., p. 11 (1939–1 Cum. Bull. (Part 2) 168, 177); S. Rep. No. 275, 67th Cong., 1st Sess., p. 14 (1939–1 Cum. Bull. (Part 2) 181, 191).

The most obvious import of this new provision was to eliminate the need to divide expenses of food and lodging into deductible "business" and nondeductible "personal" portions. By this change, Congress intentionally allowed a taxpayer who met the requisite of being "away from home" on business to deduct a part of his personal or living expenses. But Congress at the same time retained in Section 215(a) of the same Act, 42 Stat. 227, the general prohibition against deducting such expenses. Thus, Congress could hardly have intended that every man who travels in any way

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[7] *Id.* at 50, 234–235.

[8] Until 1962 identical language allowing the deduction of traveling expenses incurred while away from home was in subsequent Internal Revenue statutes allowing the deduction of ordinary and necessary business expenses (see note 4, *supra*). Section 4(b), Revenue Act of 1962, 76 Stat. 960, amended Section 162(a)(2) of the 1954 Code by striking "(including the entire amount expended for meals and lodgings)" and inserting in lieu thereof "(including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances)". The amendment does not affect the issue of the present case.

in connection with his business be allowed to deduct all expenses incurred while traveling. For example, Congress clearly intended,[9] and this Court has recognized, that the new Act did not give commuters a deduction for the cost of lunch. For, the predecessor of Section 162(a)(2) was "to be contrasted with" the predecessor of Section 262 and, "in light of the interpretation given [the former] * * * [by] Treasury Regulations", the commuter's expenses are not deductible. *Commissioner* v. *Flowers,* 326 U.S. 465, 469–470.

Nor is it likely that Congress intended to allow a taxpayer who travels during the business day and who, like the commuter, returns home in the evening to deduct his meal expenses simply because he traveled a greater distance or a longer time than the commuter. As the Ninth Circuit observed in *James* v. *United States,* 308 F. 2d 204, 206–207:

> Congress freed from taxation income spent on personal living expenses while on business trips. This discriminates against taxpayers whose business does not require travel, and who therefore pay tax upon all of the income which they devote to their personal living expenses. The discrimination may be substantial.
>
> It is not surprising, therefore, that Congress did not allow the deduction of this total amalgam of personal living expense and business expense in every situation involving business

[9] See statement of Dr. T. S. Adams, note 6 *supra* at 234.

> travel. The total cost of meals and lodging was made deductible only when the travel is also "away from home." * * *

For these reasons, Congress must have intended that the phrase "away from home" would limit those trips on which expenses for food would be treated as deductible "living" expenses.[10] It is improbable indeed that the windfall of deducting the "living" expense portion of meals purchased while on a business trip was intended generally to apply except in the case of a taxpayer who incurs substantially increased or duplicated living costs in the pursuit of a trade or a business. Congress, rather, must have contemplated that the deduction would obtain only when business travel would normally result in "living" expenses significantly greater than usual.

Increases or duplication in living costs are most likely to occur—and in a substantial amount—when a traveler is away long enough to require sleep or rest so that the cost of his meals is coupled with a lodging expense. The ordinary taxpayer is not likely to incur a significant enlargement of his expenses unless he finds it necessary to engage lodging. Virtually every person must maintain and pay for a personal residence, whether or not he sleeps there on a given night. But, a multitude of businessmen must on any given day purchase one or more meals, even though, except for commuting, they travel not at all; and when

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[10] Any other conclusion would render the phrase wholly redundant—certainly any "travel" takes the traveler "away from" his home.

they do so, their family food bill is decreased at least in part. Finally, the statute links "meals and lodging" in the conjunctive—thus suggesting that some meaningful relationship between the two was intended. *Commissioner* v. *Bagley*, 374 F. 2d at 207.

II. SINCE 1940 THE COMMISSIONER HAS CONSISTENTLY INTERPRETED THE STATUTE AS ALLOWING A DEDUCTION FOR THE COST OF MEALS ONLY WHEN THE TRIP REQUIRED SLEEP OR REST; CONGRESS, WHICH WAS AWARE OF THIS INTERPRETATION WHEN IT ENACTED THE 1954 CODE, THEREBY APPROVED IT

The Commissioner's administrative interpretation was first published in 1940.[11] I.T. 3395, 1940-2 Cum. Bull. 64, ruled that locomotive engineers and trainmen

[11] The only ruling published before 1940 that ~~dealt with the~~ arguably dealt with the expenses of meals and lodging while ~~traveling~~ was I.T. 1380, I-2 Cum. Bull. 88 (1922), which ruled:

> Field officers of the Bureau of Internal Revenue may deduct the amounts expended by them for meals and lodging for such days as they receive per diem allowance. The amount of the allowance should be included in gross income. Office deputies or field officers having posts of duty and maintaining homes elsewhere may not deduct amounts expended for commuter's fares in traveling between such points, or for meals and lodging while at post of duty. Amounts so expended are personal expenses.

Per diem allowances have been paid to Bureau personnel for travel not requiring a lodging expense. However, in response to an inquiry of the Assistant Attorney General in charge of the Tax Division, made in the course of briefing this case, the Chief Counsel of the Internal Revenue Service advised that the Service's position is that I.T. 1380 does not allow a deduction for meal expenses incurred on trips that do not require sleep or rest, even if a partial per diem is paid, and that I.T. 1380 will be clarified to eliminate any ambiguity in this respect.

who were required to obtain lodging for rest prior to the return portion of their trips could deduct the costs of their meals and lodging incurred on such trips.

Prior to that time the issue was apparently not litigated. In litigation thereafter the Commissioner consistently contended that the costs of meals purchased on one-day trips not requiring sleep or rest could not be deducted, and the courts consistently sustained this position.[12] Numerous rulings expressed the same view.[13] In 1946, the sleep-or-rest rule was prescribed in the publication, Your Federal Income Tax,[14]

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[12] See *Amoroso* v. *Commissioner*, 193 F. 2d 583 (C.A. 1), affirming a Tax Court decision (P–H Memo T.C., par. 51,058), certiorari denied, 343 U.S. 926; *Mortrud* v. *Commissioner*, 44 T.C. 208; *Armstrong* v. *Commissioner*, 43 T.C. 733; *Smith* v. *Commissioner*, 33 T.C. 861; *Winn* v. *Commissioner*, 32 T.C. 220, 225; *Herrin* v. *Commissioner*, 28 T.C. 1303; *Osteen* v. *Commissioner*, 14 T.C. 1261; *Drill* v. *Commissioner*, 8 T.C. 902; *Cummings* v. *Commissioner*, P–H Memo T.C., par. 61,330; *Fogle* v. *Commissioner*, P–H Memo T.C., par. 59,214; *Flaherty* v. *Commissioner*, P–H Memo T.C., par. 52,195; *Fairley* v. *Commissioner*, P–H Memo T.C., par. 48,144; *Blatt* v. *Commissioner*, P–H Memo T.C., par. 47,020; *Hataway* v. *Commissioner*, P–H Memo T.C., par. 44,369.

[13] I.T. 3395, 1940–2 Cum. Bull. 64; Rev. Rul. 190, 1953–2 Cum. Bull. 303, 305; Rev. Rul. 54–497, 1954–2 Cum. Bull. 75, 77–81; Rev. Rul. 55–109, 1955–1 Cum. Bull. 261, 262; Rev. Rul. 56–508, 1956–2 Cum. Bull. 126; Rev. Rul. 55–235, 1955–1 Cum. Bull. 274; Rev. Rul. 55–604, 1955–2 Cum. Bull. 49; Rev. Rul. 61–67, 1961–1 Cum. Bull. 25; Rev. Rul. 61–221, 1961–2 Cum. Bull. 34; Rev. Rul. 63–82, 1963–1 Cum. Bull. 33; Rev. Rul. 63–239, 1963–2 Cum. Bull. 87.

[14] "Your Federal Income Tax" is a booklet issued annually by the Treasury Department to help explain the income tax laws to individual taxpayers to enable them to fill out their returns correctly. Since the 1946 edition, that publication has stated—usually with examples given—that a taxpayer may not deduct the cost of meals incurred on business trips unless he

and in 1948 in the instructions accompanying the income tax return.[15]

In the review of the tax laws that resulted in enactment of the 1954 Code, Congress at three separate points considered the Commissioner's "overnight" rule. First, Congress was presented with a taxpayer plea for a change in the rule that disallowed deductions for the cost of meals purchased on one day trips. 1 House Hearings on General Revenue Revisions (1953), 83d Cong., 1st Sess., 214–219; see also 1 Senate Hearings on the Internal Revenue Code of 1954, 83d Cong., 2d Sess., 8,482; 4 Senate Hearings on the Internal Revenue Code of 1954, 83d Cong., 2d Sess., 2396. But no such general change was made.

Congress retained in Section 162(a)(2) the precise language that in 1921 was applied to meals and lodging—that such costs be deductible only when incurred "while away from home". A like formulation was used in Section 62(2)(B) in defining adjusted gross income.

Congress did draft two limited exceptions to the Commissioner's interpretation, and in each instance showed its understanding and suggested its approval

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was away from home overnight or had to sleep or rest. *E.g.*, see the 1946 Edition, pp. 89–90; the 1954 Edition, p. 133; the 1955 Edition, p. 16; the 1959 Edition, pp. 42, 43; the 1960 Edition, pp. 50, 51; the 1961 Edition, pp. 49, 50; the 1963 Edition, pp. 48, 49; the 1964 Edition, pp. 49, 50; the 1965 Edition, pp. 37, 38; and the 1967 Edition, pp. 42, 43.

[15] The reference to the "overnight" rule was set out on page 6 of the instruction pamphlets for Form 1040 for the years 1948 through 1960; on page 4 of the instructions for 1961 through 1963; and on page 7 of the instructions for 1964, 1965, and 1966.

of the Commissioner's view of the statutory language.

One exception dealt with meal allowances that States give their police officers. Thus, Congress enacted Section 120 of the 1954 Code, which allowed the patrolmen to exclude such allowances from income, up to $5 per day. The exclusion in no way turned on whether an officer was "away from home." But, in discussing officers who spent more than $5 for meals on a given day, both the House and Senate Reports stated that the officers could deduct expenses over the $5 limit "for meals while away from home *overnight*"—referring thereby to the Commissioner's interpretation of the predecessor of Section 162(a)(2). H. Rep. No. 1337, 83d Cong., 2d Sess., A39–A40; S. Rep. No. 1622, 83d Cong., 2d Sess., 191. [Emphasis supplied.]

The other congressional recognition of the Commissioner's interpretation occurred in the consideration of transportation expenses. The Commissioner had recognized such costs to be "necessary" business expenses in 1919, see Treasury Regulations 45 (1919 ed.), Article 292, when there was no statutory language dealing with "travel" expenses as such. An apparent legislative oversight in 1944 had made it impossible for employees who took the standard deduction to eliminate from their taxable incomes business expenses, including amounts spent on transportation, incurred in the course of their duties unless they were reimbursed by their employer, or the costs were incurred in "travel away from home." Internal Revenue Code of 1939, Section 22(n) as added by Section 8(a) of the Individual Income Tax Act of 1944, c.

210, 58 Stat. 231. Employees using the standard deduction who were not reimbursed for transportation costs incurred on daily trips tried to deduct them as "traveling" expenses in determining adjusted gross income on which the standard deduction was computed. But the Commissioner in applying his sleep-or-rest rule disallowed any such deductions based on one day trips.[16] In recommending Section 62(2)(C) of the 1954 Code, which allows the deduction of employee transportation expenses in computing adjusted gross income, the Senate Finance Committee commented (S. Rep. No. 1622, *supra* at 9) as follows:

> At present, business transportation expenses can be deducted by an employee in arriving at

[16] In litigated cases, courts anomalously allowed transportation expense deductions incurred on one day trips, while they at the same time denied deductions for the cost of meals on the same trips on the ground that the travel was not "away from home." See, *e.g.*, *Winn* v. *Commissioner*, 32 T.C. 220, 224–225 (allowing transportation expense deductions but disallowing meal expense deductions on the same trips); *Summerour* v. *Allen*, 99 F. Supp. 318 (M.D. Ga.) (meal expense deductions disallowed; transportation expense would have been allowed if amount spent away from home county had been proved); *Podems* v. *Commissioner*, 24 T.C. 21, 23.

The First Circuit, in *Commissioner* v. *Bagley*, *supra*, recognized that the case in which it had allowed a deduction of transportation expenses, *Chandler* v. *Commissioner*, 226 F. 2d 467 (C.A. 1), "was an instance of a hard case making bad law. * * * [W]e must conclude that the decision in *Chandler* is incorrect as a guide to the construction of Section 162(a)(2)." 374 F. 2d at 208.

> adjusted gross income only if they are reimbursed by the employer or if they are incurred while he was *away from home overnight.* * * *
>
> Because these expenses, when incurred, usually are substantial, it appears desirable to treat employees in this respect like self-employed persons. For this reason both the House and your committee's bill permits employees to deduct business transportation expenses in arriving at adjusted gross income even though the expenses are not incurred in travel *away from home* or not reimbursed by the employer. * * * [Emphasis supplied.]

See also S. Rep. No. 1622, *supra,* at 169; H. Rep. No. 1337, *supra,* at 9, A19.

It is well established that Congressional review and re-enactment of a tax statute after being informed of the Commissioner's interpretation provides persuasive evidence of tacit Congressional approval. See *e.g., Commissioner* v. *Bilder,* 369 U.S. 499, 502–505; *Commissioner* v. *Lester,* 336 U.S. 299, 301–303; *White* v. *Winchester Club,* 315 U.S. 32, 41; *Harrison* v. *Northern Trust Co.,* 317 U.S. 476, 479.

III. THE DECISIONS OF THE SIXTH AND EIGHTH CIRCUITS REJECTING THE COMMISSIONER'S LONG-STANDING INTERPRETATION OFFER NO ALTERNATIVE RULE AND ALLOW THE DEDUCTION OF MEAL EXPENSES BY THOSE IN THE SAME POSITION AS THE COMMUTER AND INTRA-CITY AND ITINERANT TRAVELER

Between 1944 and 1962 there were more than a dozen cases in which the taxpayer claimed a deduc-

tion for the cost of meals eaten on trips which did not require sleep or rest. The trial courts uniformly refused to allow the deduction.[17]

Only one such case was taken to a court of appeals. In *Amoroso* v. *Commissioner,* 193 F. 2d 583 (C.A. 1), certiorari denied, 343 U.S. 926, the First Circuit sustained the disallowance of such meal expenses incurred by a taxpayer who traveled daily within the greater Boston area, because his "situation resembles that of a commuter when he is in the Boston area." 193 F. 2d at 585.

The only case that cast doubt on the Commissioner's sleep-or-rest rule during that period was *Williams* v. *Patterson,* 286 F. 2d 333 (C.A. 5). The rule was only tangentially involved. The issue was whether a railroad conductor who claimed a deduction for the costs of meals, lodging and tips during a six-hour layover had been required to stop for rest by his employer. Accord, *Commissioner* v. *Bagley,* 374 F. 2d at 205 n. 4. The court nonetheless asserted that the Commissioner's rule was a "gloss * * * dreamed up by the Department." But, in allowing a deduction of the cost of meals and lodging the court concluded with an observation which, in essence, restated the 1940 ruling, I.T. 3395 (286 F. 2d at 340):

> If the nature of the taxpayer's employment is such that when away from home, during released time, it is reasonable for him to need and to obtain sleep or rest in order to meet the exigencies of his employment or the business demands of his employment, his expenditures

[17] See cases cited in footnote 12, *supra.*

(including incidental expenses, such as tips) for the purpose of obtaining sleep or rest are deductible traveling expenses under Section 162(a)(2) of the 1954 Code.

Hanson v. *Commissioner,* 298 F. 2d 391 (C.A. 8), was the first appellate decision that rejected the Commissioner's sleep or rest rule where meals, but not lodging, were purchased. Hanson, a construction contractor, claimed travel expense deductions for the cost of his meals on daily trips to out-of-town job sites. Reversing the Tax Court, which had specifically applied the sleep-or-rest rule in disallowing the deduction, 35 T.C. 413, the Eighth Circuit thought illogical the proposition that a taxpayer's meals could not be deducted on a trip where he leaves in the morning but returns home the same evening, even though the same meals could have been deducted if a second day were added to the trip (298 F. 2d at 396). In response to the Commissioner's argument that Hanson would receive a "grossly unfair advantage" over other taxpayers who, because of their jobs, must eat their meals away from their residence, the court said only that such a result was the "legislative mandate" (*ibid.*). The court observed that all cases in this area "must be decided according to their own sets of facts" and concluded that every time Hanson traveled on business "away from the area of Washington, Iowa," he was "away from home" for tax purposes and his meal expenses consequently were deductible (*id.* at 397).

The Commissioner announced that he would not follow the *Hanson* decision. Rev. Rul. 63–239, 1963–2

Cum. Bull. 87. Then the present case was brought and tried. When the case came before the Sixth Circuit on the government's appeal, that court regarded *Hanson* v. *Commissioner, supra,* as the "closest appellate case in point" (R. 72). The Sixth Circuit criticized the Commissioner's sleep-or-rest rule as bearing "no rational relation to the business necessity of the meal expense" and as a "time element" which is hardly relevant to the question in "an era of supersonic travel" (*id.* at 89). The appellate court allowed respondent a deduction for the cost of his breakfast and lunch on daily business trips, stating (R. 73): "While the rule adopted by Appellate Courts may not always work satisfactorily, we believe that the remedy lies with Congress and not with the judiciary." The court offered no articulation of the rule "adopted by the Appellate Courts" other than that the Commissioner was wrong. (R. fol. 72–73.) Presumably, the Sixth Circuit, like the Eighth, would have each case turn on the trier of fact's opinion of whether a particular taxpayer was "away from home" on a particular day.

The Sixth Circuit also drew upon (R. fol. 72) the decision of the Tax Court in *Bagley* v. *Commissioner,* 46 T.C. 176, which had been rendered subsequent to the trial of the present case. There, the Tax Court, relying on *Hanson,* discarded its prior view that the sleep or rest rule was a valid exercise of the Commissioner's interpretative authority. Bagley, a consulting engineer, claimed as a deduction the cost of three meals a day he purchased on daily round trips of 140 to 150 miles. In a reviewed decision, the Tax Court allowed the de-

duction. Conceding that the sleep or rest rule provided "simplicity and certainty," the majority concluded (*id.* at 183):

> We will no longer follow the "overnight" rule as an absolute guide in every situation. There is merit in the "hour-distance" test and other tests when applied to exceptional factual patterns. Consequently, each such case will be decided according to its own facts.

Although several concurring judges strongly urged that the basis of the court's holding be clarified, the court made no attempt to state the standards that would govern the weighing of facts in future cases.

In reversing the Tax Court decision in *Bagley*, the First Circuit, 374 F. 2d 204, pointedly criticized the opinions of the Eighth Circuit in *Hanson* and the Sixth Circuit in this case. Responding to the suggestion of the Sixth Circuit (R. fol. 73) "that [creating a workable standard for meal expense deductions] lies with Congress and not with the judiciary," the First Circuit observed that "the Commissioner's rule has worked adequately for many years, and that the remedy which is needed is to correct its unsettling by the judiciary itself" (374 F. 2d at 206).

In rejecting the long-standing effort by the Commissioner to translate the statutory concept into a rule that reflects a reasonable accommodation of the Congressional policies embodied in Sections 162(a)(2) and 262, the Eighth and Sixth Circuits and the Tax Court have launched taxpayer and Commissioner alike on a sea of uncertainty. As observed by the concurring

opinions in *Bagley* v. *Commissioner*, 46 T.C. 176, the majority opinion, in adopting a vague *ad hoc* meaning for "while away from home," would tend to "foster litigation by casting a cloud over such cases as *Osteen, Herrin,* and now *Mortrud*" (p. 188); further, "it is not clear what rule is being substituted for [the sleep-or-rest rule, thus] * * *. * * * compelling people to engage in further litigation" (p. 189). See also *Commissioner* v. *Bagley*, 374 F. 2d at 205, 207.

Taxpayers and the Commissioner are simply directed to consider all the facts of each case with no hint as to how to draw the boundaries of relevance. See *Bagley* v. *Commissioner*, 46 T.C., at 183; *Hanson* v. *Commissioner*, 298 F. 2d at 397. Especially where, as here, the issue involves large number of taxpayers and almost infinitely varied factual patterns, what is needed is "a practical administrative approach which will not permit [or require] every meal-purchasing taxpayer to take pot luck in the courts * * *" *Commissioner* v. *Bagley*, 374 F. 2d at 207.[18]

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[18] In 1963, after *Hanson* was decided, the Treasury proposed to Congress that the statute be changed to provide that:

> Food and lodging expenses would be deductible by taxpayers who were temporarily away from their duty areas for periods of at least 16 hours, or a shorter time if they could prove that substantial rest was required on such trip. Itinerants would not be entitled to any food or lodging expense deductions, since they would not have a duty area. [1 House Hearings before Committee on Ways and Means on the President's 1963 Tax Message, 88th Cong., 1st Sess., p. 98.]

The term "home" would have been replaced by "duty area" encompassing (1 Hearings, *supra*, p. 98) "a circular area of 20

IV. THE COMMISSIONER'S LONG-STANDING SLEEP OR REST RULE IS REASONABLE AND PRACTICAL; IT SHOULD BE SUSTAINED

In applying to the meal expenses the statutory distinction between nondeductible "personal" expenses and deductible "business" expenses the starting point should be the tax treatment of commuters, who often cannot, as a practical matter, live next to their work locations, and must therefore each workday eat one or more of their meals away from their residences. They cannot deduct the meal costs under Section 162(a). *E.g., Commissioner* v. *Flowers,* 326 U.S. 465; *Carragan* v. *Commissioner,* 197 F. 2d 246, 249 (C.A. 2); *Steinhort* v. *Commissioner,* 335 F. 2d 496 (C.A. 5). Similarly, taxpayers—like some of respondent's colleagues—who travel on business within their cities of residence cannot deduct the cost of meals eaten on their business travels. *E.g., Amoroso* v. *Commissioner, supra.* Nor can the itinerant traveler—who has no fixed home or principal place of business. E.g., *James* v. *United States, supra; United States* v. *Mathews,* 332 F. 2d 91 (C.A. 9); *Hicks* v. *Commissioner,* 47 T.C. 71; *Duncan* v. *Commissioner,* 17 B.T.A. 1088, 1091–1092, af-

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mile radius with the taxpayer's principal business post as its center". The President stated that the proposals were made because—

> "While the Service's interpretations have generally been sustained in litigation, some courts have adopted contrary rules, so that there is now a lack of certainty and of uniformity regarding some aspects of the travel expense area." President's 1963 Tax Message, p. 98.

The proposal was not reported out of the House Ways and Means Committee.

firmed per curiam, 47 F. 2d 1082 (C.A. 2); *Fisher* v. *Commissioner,* 230 F. 2d 79 (C.A. 7).

Equality of treatment among similarly situated taxpayers is one of the fundamental goals of our system of taxation. *Automobile Club of Michigan* v. *Commissioner,* 353 U.S. 180, 185–186. It is especially important here [19] since taxpayers who are considered to be "away from home" on business are allowed—because of administrative considerations that Congress in 1921 found compelling—to deduct the "entire amount" of their meal expenses, not just the portion attributable to business travel.[20] Thus, such taxpayers receive what amounts to a windfall in the form of a deduction for what is, in part, a personal living expense. There-

[19] Congress in 1958 emphasized that equality of treatment of similarly situated taxpayers is a basic objective in the context of business-related meal expenses. In that year, Congress repealed Section 120 of the 1954 Code, see Technical Amendments Act of 1958, § 3(c), 72 Stat. 1606, which had allowed state police to exclude from their income $5 daily meal allowances, see p. 18, *supra.* The Senate Finance Committee gave as one of its reasons (S. Rep. No. 1983, 85th Cong., 2d Sess., 14):

> * * * this exclusion is inequitable because there are many other individual taxpayers whose duties also require them to incur subsistence expenditures regardless of the tax effect. Subsistence expense incurred by taxpayers generally in the performance of services as employees while away from home are deductible * * *.
>
> To bring the tax treatment of subsistence allowances for police officials in line with the treatment of such allowances in the case of other taxpayers, your committee's bill * * * repeals the section of present law providing this $5 exclusion.

[20] The 1962 amendment, see note 8 *supra*, does not change the result of allowing a deduction that in part represents a "living" expense.

fore, the statute should be interpreted, insofar as possible, to eliminate unfair discrimination by limiting the deduction to those taxpayers who, while on business travel, typically incur daily "living" expenses substantially greater than those incurred by persons who may not take a deduction.

But the result below causes unequal treatment of similarly situated taxpayers. Respondent, while away from his residence for approximately 12 hours daily, bought breakfast and lunch, and then returned home in time for his evening meal (R. 46a–47a, 49a–50a, 54a). He, the Sixth Circuit states, should have the deduction. But what of his fellow salesmen whose routes are entirely within their hometowns (R. 37a–38a)? They, like any intra-city traveler, plainly may not deduct the costs of their meals. They, the commuter, respondent and any one day traveler are all in identical economic positions. Nothing in the opinion below explains or justifies giving them differing tax treatment.

The Sixth Circuit thought that "[i]n an era of, supersonic travel" the Commissioner's rule "is hardly relevant" and "bear[s] no rational relation to the business necessity of the meal expense" (R. fol. 72–73). But "business necessity" is not the question here; the need for determining when a taxpayer is "away from" his home cannot so easily be avoided. Modern high speed travel, far from impeaching the Commissioner's interpretation, creates even greater reason to sustain the sleep or rest rule in order to avoid giving more favorable tax treatment to persons such as respondent and the man who takes a one day jet trip between

New York and Chicago [21] than is given a commuter or respondent's fellow salesmen whose routes were entirely within their hometowns. Indeed, the jet traveler is in no different position than the taxpayer who, just as a businessman could do in 1925, takes a one day train trip between New York and Philadelphia. Whether viewed in terms of "business necessity" or the economic impact of their travel, all of these taxpayers are in the same position and all should receive the same tax treatment under Sections 162(a)(2) and 262.

In contrast to such arbitrary discriminations, which the Sixth and Eighth Circuits would allow, the First Circuit in *Bagley* could see (374 F. 2d, p. 207)—

> no justification for allowing salesman Correll two meals, and salesman Amoroso none. Nor would we give Amoroso one and commuter Osteen none.[22] Equally, we see no reason, to

[21] The magnitude of the discriminations that would result from the decision below is demonstrated by the increasing amount of one day business travel by air. In the 12-month period ending March 1964, there were 8,321,839 outbound domestic flight passengers departing the New York area's three major airports, La-Guardia, Newark and Kennedy International. Six million three hundred and ninety-four thousand passengers started their trips in New York. Sixty-three percent of these, or 4,056,000 were traveling for business reasons. Sixteen percent of the 4,056,000 returned to the New York area the same day they departed. New York's Domestic Air Passenger Market, April, 1963, through March 1964, The Port of New York Authority, Aviation Economics Division, May 1965, pp. 7, 11, 17, 55.

[22] Osteen was a railway postal clerk who was denied a business travel expense deduction for lunches on a daily trip to a city 100 miles from his home, and Amoroso was a salesman residing 10 miles away from the city of Boston who was denied deductions for meals purchased while traveling on business

take a frequently referred to hypothetical, why a man who makes a quick trip to Washington, missing neither breakfast nor dinner at home, should be allowed his lunch merely because he is traveling more miles than Amoroso, the salesman who travels locally. The courts in *Hanson* and *Correll* do not discuss this inevitable question. We think, at best, that all they do is to push the dividing line somewhere else, with no avoidance of the ultimate necessity, and difficulty, of drawing it. At worst, they make the drawing of it considerably harder.

The Commissioner's rule, unlike the result below, generally allows the deduction only to persons whose travel expenses significantly exceed those incurred by taxpayers who cannot have the deduction. Where a taxpayer is away from his home city such a period of time that he must sleep or rest, ordinarily he will incur lodging expenses which will essentially duplicate the usually substantial expense of maintaining his permanent residence. It is those taxpayers who are in a significantly different—and substantially more burdened—economic position than the commuter, the intra-city traveler or the itinerant with no fixed abode. Only persons in so different a position should be en-

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within the greater Boston metropolitan area. *Osteen* v. *Commissioner*, 14 T.C. 1261; *Amoroso* v. *Commissioner*, 193 F. 2d 583 (C.A. 1), certiorari denied, 343 U.S. 926.

titled to the benefit of the deduction. As stated in *Commissioner* v. *Bagley, supra* at 206:

> the manifest statutory purpose is to permit deductions when business activities require duplication. Lodging away from home may well be all extra expenses. However, even though a meal away from home may be more expensive, presumably it is not all added cost. * * *
>
> * * * * *
>
> We believe that fairness to the greatest number of people * * * [requires acceptance] of the Commissioner's sleep or rest rule.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded to the district court with directions to dismiss the complaint.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
HARRIS WEINSTEIN,
Assistant to the Solicitor General.
GILBERT E. ANDREWS,
EDWARD L. ROGERS,
Attorneys.

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